

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**RENEWED MOTION OF HATEM NAJI FARIZ TO TRANSFER VENUE, OR, IN
THE ALTERNATIVE, FOR RELIEF FROM EFFECTS OF PREJUDICIAL
COURTHOUSE SECURITY MEASURES, MOTION FOR SUPPLEMENTAL
VOIR DIRE, AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth Amendment's Due Process Clause, the Sixth Amendment, and Federal Rule of Criminal Procedure 21(a), hereby respectfully renews his request that this Honorable Court transfer venue in this case from the Tampa Division of the Middle District of Florida to a venue outside the State of Florida. In the alternative, Mr. Fariz would request that the Court order the removal of the conspicuous yellow security barriers that surround the courthouse, conduct supplemental voir dire on the issue, and/or state specific findings as to the reasons and justification for such prejudicial security measures. Mr. Fariz additionally requests that, prior to the start of trial, the Court conduct supplemental voir dire concerning the jurors' exposure to media or other potential prejudice. As grounds in support, Mr. Fariz sets forth the following memorandum of law.

I. Introduction

Due to excessive prejudicial pretrial publicity, on May 2, 2005, Mr. Fariz filed his Motion to Transfer Venue, supported by several exhibits, including the report of Professor

Edward J. Bronson and a survey of jury-eligible persons in the Tampa Division and three comparative divisions.¹ (Doc. 994). On May 16 - 18, 2005, the Court conducted voir dire of a panel of approximately 150 of the 322 potential jurors who returned questionnaires. Ultimately, 89 potential jurors were selected as eligible to serve on the jury in this case. On May 19, 2005, the Court heard peremptory strikes, and a 12 member jury was selected with 10 potential alternates.² On May 20, 2005, Mr. Fariz filed his supplemental motion for change of venue arguing that the voir dire did not adequately rebut the presumption of prejudice he demonstrated in his original motion to transfer venue. (Doc. 1102). On May 23, 2005, the Court denied Mr. Fariz' motions to transfer venue. (Doc. 1115).

The trial is scheduled to begin Monday, June 6, 2005, at 9:00 a.m. On Friday, June 4, 2005, a barricade was constructed around the federal courthouse in Tampa. The barriers are bright yellow and circle the perimeter of the entire city block on which the courthouse stands. The barriers are the type that are connected together and filled with water for weight and stability.³

Mr. Fariz' defense team observed that at least one local television news station broadcast the trucks filling the barriers with water and stated that the barriers are being

¹Defendant Al-Arian also filed a motion to change venue which was denied. (Doc. 991 and 1115).

²The Court is currently contemplating whether the Federal Rules of Criminal Procedure allow for seating more than six alternate jurors.

³Photos of the barriers are attached as Exhibit A, B, and C. The tank truck used to filled the barriers with water can be seen in Exhibit A.

constructed in preparation for the trial beginning Monday. Today's St. Petersburg Times states that:

To prepare for [the trial], the U.S. Marshals Service has categorized the trial as "high threat" and taken special precautions. Friday, security officers set up thick plastic barricades in the street around the courthouse, to block off the lane of traffic closest to the building. They have also installed additional metal detectors and increased the number of security officers on duty.

Exhibit D. The New York Times states that "courthouse officials have stepped up security to head off possible disruptions in a case that has routinely drawn demonstrations from local Muslims over Mr. Al-Arian's treatment." Exhibit E. Whether the security was put in place because of the claim that the charges are "terrorism"-related, or merely for crowd control, Mr. Fariz contends that the excessive security, particularly the yellow barricade around the courthouse, is prejudicial and violates his constitutional due process rights. Such measures only serve to demonstrate the disproportional response to this case and suggests to people coming to the courthouse, including the jurors, that there is something to be concerned about in this case. The jurors will certainly notice these security measures, since they were not in place when the jurors came to Court for jury selection.

As relief, Mr. Fariz would renew his motion to change venue. Mr. Fariz contends that even if the Court was successful in seating an impartial jury notwithstanding the years of prejudicial pretrial publicity, any opinions or feelings the jurors were able to set aside during jury selection may necessarily return when they arrive at a courthouse which has been

obviously secured against the possibility of a terrorist attack.⁴ Alternatively, Mr. Fariz would request that the Court outline the reasons justifying the security barriers as well as conduct supplemental voir dire on this issue.

Mr. Fariz also requests that the Court conduct supplemental voir dire regarding any publicity that the jurors have viewed, whether they have discussed the case or their selection as a juror with others, and whether any jurors have been contacted by the media and/or the public in regards to the case. Mr. Fariz previously outlined the necessity of conducting supplemental voir dire following a delay between jury selection and the evidentiary portion of a trial. Doc. 946 at 3-5. Mr. Fariz reasserts this argument and reincorporates it by reference.

II. Law

The Constitution guarantees that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). While the Court cannot avoid “every practice tending to single out the accused,” “certain practices pose such a threat to the ‘fairness of the factfinding process’ that they must be subjected to ‘close judicial scrutiny’” *Id.* at 567 - 68 (quoting *Estelle v. Williams* 425 U.S. 501, 503 - 504 (1976)).

⁴This Court previously recognized the Defendants’ concern regarding the effects of increased security measures on jurors’ impartiality. Doc. 1081 at 5.

For example, it is well-established that the use of physical restraints on a defendant during trial “tend[s] to erode [the] presumption of innocence” and such restraints “might have a significant effect on the jury’s feelings about the defendant.” *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002) (citations omitted). Therefore, physical restraints should be used as rarely as possible. *Id.* Furthermore, the imposition of physical restraints is subject to careful judicial review; the district court is required to place the reasons for its decision to use such measures on the record. *Id.*

A court may not base its decision to employ extraordinary security measures on the mere invocation of the name of an organized crime group. *United States v. Ross*, 33 F.3d 1507, 1521 n. 26 (11th Cir. 1994) (citing *United States v. Varios*, 943 F.2d 236, 241 (2d Cir. 1991)) (stating that “the district court erred insofar as it simply referred to another Mafia trial as support for its decision [to employ an anonymous jury]. Although evidence about the role of organized crime in the payoff scheme was certain to be relevant at Vario’s trial, the essence of the government’s case was that the scheme was enforced by economic reprisals, not intimidating acts such as would bear on the issue of juror safety or fear.”).

III. Argument

A. The Behavior of the Defendants Does Not Merit Any Extraordinary Security

Mr. Fariz has been free on bond for two years. Magistrate Judge Pizzo found that he was neither a flight risk nor a danger to the community. (Doc. 74). His conditions of supervised release are standard, and he has successfully complied with all conditions. He

has been allowed free travel within the Middle District of Florida, and with the permission of his pretrial services officer, he has made several trips to Chicago. Mr. Fariz attends most court hearings in his case and pays proper respect to the Court and court staff. Mr. Fariz has been under the Court's supervision for two years, and has not demonstrated any behavior which would merit *any* extra security measures much less the extraordinary measures that are being taken for his trial.⁵

B. Whether the Charges in the Case Justify Any Extraordinary Security

As acknowledged by the government, none of the Defendants before the Court are alleged to have been involved in any attacks or in the planning of any of the attacks alleged in the indictment and the violence at issue in this case occurred thousands of miles away. *See* Doc. 636, Superseding Indictment; Doc. 89, Tr. 3/25/03, at 127 (statement of Walter Furr, Assistant United States Attorney). The State Department's report, Patterns of Global Terrorism 2004, states that "PIJ has not yet directly targeted US interest; it continues to direct attacks against Israelis inside Israel and the territories" *Available at* <http://www.state.gov/s/ct/rls/45394.htm>. Mr. Fariz therefore questions whether the security measures are appropriate, given his constitutional rights, including his presumption of innocence and right to a fair trial. While the provision of security is within the province of

⁵Mr. Fariz would further note that Defendant Ballut was removed from the Transportation Security Administration's "no fly" list and flew uneventfully on a commercial airline from Chicago to attend the jury selection proceedings.

the Court and the U.S. Marshals Service, he is concerned that these measures unfairly and unnecessarily prejudice him.

C. The Excessive Security Measures Are Prejudicial and Violate Mr. Fariz' Constitutional Rights.

The government claims that this is a terrorism case. However, that label does not alone justify the security measures that have been taken. Before the jury selection held on May 16 - 18, 2005, metal fences were put in place outside the front entryway of the courthouse. In addition, since the beginning of this case, the Court has used an additional metal detector set up outside the courtroom, meaning that people attending court hearings in this case have had to go through two metal detectors prior to coming to the courtroom. Even assuming that the jurors did not observe these additional security measure when they reported for jury selection, when the jurors arrive for opening statements on the morning of June 6, 2005, they will find that an entire city block has been cordoned off by a large, yellow barrier of the type clearly designed for heavy security. After the Oklahoma City federal building bombing, September 11, and other terrorist attacks throughout the world, most people can deduce the purpose of a barrier such as the one currently barricading Tampa's federal courthouse: to prevent a vehicle containing explosives from getting too close to the building. Whether or not the risk of a terrorist attack is the reason for construction of the barrier, the implication is unavoidable. The very idea that the courthouse is at risk of a terrorist attack because of the occurrence of Mr. Fariz' trial is highly prejudicial against him and violates his constitutional rights.

Mr. Fariz contends that the exceptional security measures taken for the event of his trial is prejudicial and violates his right to trial before an impartial jury that presumes him to be innocent. The case law is clear that physically restraining a defendant during trial may affect the jury's presumption of innocence, and thereby should be used sparingly. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986). A heavy yellow security barricade constructed to protect the courthouse against car bombs during a terrorism case is similarly likely to affect the jury's presumption of innocence, particularly when the jury has already been subjected to years of prejudicial pretrial publicity.

IV. Request for Relief

Accordingly, Mr. Fariz would request relief as follows:

1. Mr. Fariz renews his motion to change venue. The pretrial publicity has only increased since the jury selection. The trial is covered regularly in local newspapers and on local television news broadcasts. Other communities are not subjected to the same publicity. With regard to the security, even if the same security measures were taken if the trial was held in a different community, the presence of such security may not have as significant effect on jurors who are not familiar with the case and who have not been subjected to years of prejudicial pretrial publicity.
2. In the alternative, Mr. Fariz respectfully requests that the Court state for the record the reasons justifying the use of the additional security measures.

3. Mr. Fariz requests that the Court conduct supplemental voir dire as to this issue, as well as to the jurors' exposure to media coverage and other potentially prejudicial matters since the jury was selected.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

/S/ M. Allison Guagliardo
M. Allison Guagliardo
Florida Bar No. 0800031
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
Attorney for Defendant Fariz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Assistant United States Attorney; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender